IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1206 of 1993

For Approval and Signature:

HON'BLE MR.JUSTICE J.M.PANCHAL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STATE OF GUJARAT

Versus

ISMAILBHAI MAHMAD HUSAIN KALVA

Appearance:

1. Criminal Appeal No. 1206 of 1993

MR IM PANDYA, APP, for Appellant-State.

MR AD SHAH for Respondent.

CORAM : HON'BLE MR.JUSTICE J.M.PANCHAL

Date of decision: 18/12/2004

ORAL JUDGEMENT

Instant appeal filed under Section 378 of the Code of Criminal Procedure, 1973, is directed against

judgment dated July 9, 1992 rendered by the learned Additional Sessions Judge, Bhavnagar, in Sessions Case No.4 of 1990, by which the respondent is acquitted of the offence punishable under Section 7 of the Essential Commodities Act, 1955 ["the Act" for short] on the ground that Mr.D.S.Ajavalia, who was then Chief Supply Inspector, Bhavnagar, was not authorised by the State Government under Section 12-AA(1)(e) of the Act to lodge complaint before the Special Court.

2. The respondent is dealing in edible-oil and vegetable-ghee in the name and style of Apollo Oil Depot which is situated on station road, Bhavnagar City. Apollo Oil Depot is a dealer within the meaning of Clause 2(5) of the Gujarat Essential Articles (Licensing, Control and Stock Declaration) Order, 1981 ["Order of 1981" for short]. Mr.D.S.Ajavalia, who was then Chief Supply Inspector, Bhavnagar visited the Depot of the respondent on December 7, 1989 and found that no licence was obtained by the respondent to enable him to deal in edible-oil and vegetable-ghee, though it is so required by the provisions of Order of 1981. It was also noticed by the Chief Supply Inspector that opening stock of edible-oil and vegetable-ghee was not displayed at the business premises of the respondent and thereby the respondent had committed breach of provisions of Clause-3 of the Gujarat Essential Articles Dealers (Regulation) Order, 1977 ["Order of 1977" for short]. Further, on physical verification of the stock, it was found that the stock of vegetable-ghee was 45 Kgs., whereas that of groundnut-oil was 960 kgs., which was in excess of the quantity specified under Clause-3 of Order of 1981. It was also noticed by the Chief Supply Inspector that the respondent had sold essential articles without issuing cash-memo or bills and failed to maintain accounts for the day immediately after closing his business for the day and committed breaches of Clauses 8 &9 of Order of 1977. The Chief Supply Inspector had tried to know from the respondent as to whether he was possessing any licence under the Order of 1981 and in reply thereto, he was informed by the respondent that he had applied for licence to City Mamlatdar. Therefore, a communication dated December 7, 1989 was addressed by the Chief Supply Inspector, Bhavnagar to City Mamlatdar, Bhavnagar requesting him to inform as to whether any licence under the provisions of Order of 1981 was issued in the name of Proprietor of Apollo Depot or not. The City Mamlatdar, Bhavnagar informed the Chief Supply Inspector by a communication dated December 7, 1989 that no licence was issued to the respondent, who is proprietor of Apollo Oil Depot nor any application was submitted for grant of

licence. While conducting raid at the business premises of the respondent, the Chief Supply Inspector had recorded statement of the respondent and drawn panchnama indicating as to what had transpired during the course of raid, in the presence of panch witnesses. Thereafter seizure-order was passed under the provisions of the Act. The Chief Supply Inspector had informed the Chief Supply Officer and Collector of the District about the result of the raid. After perusing report, the Chief Supply Officer of the District, on behalf of the Collector of Bhavnagar District, had informed the Chief Supply Inspector to lodge police complaint against the respondent. However, the respondent lodged complaint before the Special Court mentioning facts which constituted commission of offence by the respondent under the Act on July 6, 1990 and prayed the Court to punish the respondent under Section 7 of the Act.

3. The complaint lodged by the Chief Supply Inspector was ordered to be admitted and summons was issued to the respondent. After service of summons, plea of the respondent was recorded and as he claimed to be tried, the Chief Supply Inspector examined himself as PW.1 at Exh.10. He also produced documents, such as, panchnama indicating as to what had transpired during the course of raid at the business premises of the respondent at Exh.11, statement of the respondent recorded at Exh.12, statement of Umar Raheman, who was employed by the respondent at Exh.13, seizure-order at Exh.14, report of inspection in the prescribed form at Exh.15, intimation given by the Chief Supply Officer, Bhavnagar on behalf of Collector, Bhavnagar to him to lodge police complaint against the respondent at Exh.16, reply dated December 7, 1989 received by the Chief Supply Inspector from City Mamlatdar, Bhavnagar stating that no licence was issued to the respondent, who was proprietor of Apollo Oil Depot nor any application was submitted for obtaining licence at Exh.17 etc. in support of its case.

4. After recording of evidence of the complainant was over, the learned Special Judge explained to the respondent circumstances appearing against him in the evidence of the complainant and recorded his further statement under Section 313 of the Code. During recording of his statement, the respondent produced xerox copy of receipt issued by the City Mamlatdar, Bhavnagar indicating that a sum of Rs.70/- was received by him on November 15, 1989 for obtaining licence. He also produced xerox copy of licence issued to him in the prescribed Form 'B' as required by Clause 4(2) of Order of 1981 as well as certificate of registration issued by

the competent authority under the provisions of the Bombay Shops and Establishment Gujarat Extension and Amendment Act, 1961 at Exh.21.

5. After considering the evidence adduced by the parties and hearing their learned counsels, the learned Special Judge held that the Chief Supply Inspector was not authorized to lodge complaint before Special Court by the State Government as required by Section 12-AA(1)(e) of the Act and, therefore, the Court was not competent to take cognizance of the offence. It was also held that the respondent had applied for licence, but delay had taken place in issuance of the same to the respondent and, therefore, it was not proper to hold that the respondent was dealing in essential articles without licence. In view of abovereferredto conclusions, the learned Judge has acquitted the respondent by judgment dated July 9, 1993, giving rise to instant appeal.

6. Mr.I.M.Pandya, learned A.P.P. for the State contended that Section 11 of the Act authorises the Special Court to take cognizance of an offence punishable under the Act on a report in writing of the facts constituting such offence made by a person, who is a public servant as defined in Section 21 of the Indian Penal Code and, therefore, the learned Special Judge was not justified in not taking cognizance of the offence punishable under the Act when a report in writing of the facts constituting such offence was made by the Chief Supply Inspector, who is a public servant as defined in Section 21 of the Indian Penal Code. It was argued that the provisions of Section 12-AA(1)(e) of the Act do not override or abrogate the provisions of Section 11 of the Act at all and, therefore, the learned Judge was not justified in not taking cognizance of offence punishable under the Act on the ground that the complainant i.e. Chief Supply Inspector was not authorised by the State Government to lodge complaint against the respondent. The learned counsel of the State Government emphasised that initially it was provided in Section 12-AA(1)(e) that a Special Court was competent to take cognizance of the offence without the accused being committed to it for trial upon a perusal of police report of the facts constituting an offence under the Act, but the provisions were subsequently amended by Act 42 of 1986 with effect from September 9, 1986 and it was provided that a Special Court was competent to take cognizance of the offence without the accused being committed to it for trial upon a complaint made by an officer of the Central Government or a State Government authorising in this behalf by the Government concerned and the said provision was further

amended by Act 73 of 1986 with effect from May 1, 1987 providing that a Special Court was competent to take cognizance of the offence without the accused being committed to it for trial upon a complaint made by any person aggrieved or any recognised consumer association whether such person is a member of that association or not, which in turn, establishes that the power of taking cognizance by a Special Court is enlarged without abrogating the provisions of Section 11 of the Act and, therefore, the learned Judge was not justified in not taking cognizance of the offence committed by the respondent under the Act. What was asserted before this Court was that the respondent had no authority to deal in essential articles without obtaining licence under the provisions of Order of 1981 and, therefore, the learned Judge was not justified in minimizing the offence committed by the respondent on the ill-founded ground that application for licence was submitted which was not promptly attended to by the authority. It was argued that the learned Judge has misconstrued the provisions of the Act as well as facts brought on record of the case and, therefore, the appeal should be allowed.

7. Mr.A.D.Shah, learned counsel of the respondent, contended that Sections 12-A and 12-AA were brought into statute-book by the provisions of the Essential Commodities (Special Provisions) Act, 1981 and so long as the Amending Act, which is a temporary one, operates in the field, the Chief Supply Inspector could not have taken recourse to prosecute the respondent of an offence under the Act without authorization from the State Government. It was maintained before the Court that during the subsistence of the Amending Act, cognizance can be taken only on police report or upon a complaint lodged by an authorised officer as provided in Section 12-AA(1)(e) and not otherwise, and consequently the learned Special Judge was not competent to take cognizance of the offence. It was argued that read in the context of the objects and reasons behind the enactment of the Amending Act and the stringent provisions enacted pursuant thereto, recourse to Section 11 of the Act which provides that no Court shall take cognizance of any offence punishable under the Act except on a report in writing of the facts constituting such offence made by a person who is a public servant as defined in Section 21 of the Indian Penal Code, would frustrate the entire scheme of the Amending Act and, therefore, the view taken by the learned Special Judge should be upheld by this Court. According to the learned counsel of the respondent, Section 11 of the Act is a general provision wherein special procedure for speedy

trial was not contemplated at all and before introduction of the Amending Act, trial before a Court of Magistrate was competent, whereas Section 12-AA of the Act has introduced new chapter for trial before Special Court and hence, as provisions of Section 12-AA of the Act were operative for emergency period, other provisions of Essential Commodities Act, including Section 11 of the Act, would not be applicable. It was stressed that Section 12-AA of the Act deals with aspects including powers of summary trial, grant of permission etc. and as the entire section deals with procedure before Special Court, provisions of Section 11 of the Act would not be applicable. The learned counsel emphasised that the acquittal of the respondent is well-founded and merits no interference in instant appeal. In support of these submissions, the learned counsel placed reliance on the decisions in : (1) Re: Satish Chandra De, 1984 Cr.L.J. 1532, (2) Rajendra Kumar Swain & Anr v.State of Orissa, Vol.I 1985(2) Crimes 258, (3) G.Moungaguruswamy and another v. Agricultural Officer (Inputs), 1985(2) Criminal Law Cases 306, and (4) Suresh Singh v. The State of Bihar and another, 1991 Criminal Law Journal 720.

8. So far as merits of the matter is concerned, it was candidly admitted by Mr.A.d.Shah, learned counsel of the respondent that commission of offence under Section 7 of the Act was established, but there is no bar from invoking the provisions of Section 360 of the Code of Criminal Procedure, 1973 to the facts of the case and having regard to the nature of breaches committed by the respondent and lapse of time, the respondent should be granted benefit of probation instead of sending him to jail for minimum period prescribed by the statute. In reply to this, it was argued by Mr.I.M.Pandya, learned counsel of the State Government that the Act has been brought into force with a laudable object to ensure the availability of essential commodities at fair price and for curbing hoarding, black-marketing as well as profiteering in such commodities and, therefore, no benefit of probation should be granted to the respondent.

9. This Court has heard Mr.I.M.Pandya, learned Additional Public Prosecutor as well as Mr.A.D.Shah, learned counsel of the respondent, at length and in great detail. This Court has also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case.

10. After hearing the vehement arguments advanced at

the Bar, this Court was initially inclined to proceed on the footing that there was no authorisation in favour of the complainant by the State Government as contemplated by Section 12-AA(1)(e) of the Act enabling him to lodge complaint against the respondent because if there had been any such authorisation, it would have been brought to the notice of the trial Court by the complainant himself or by the learned counsel of the complainant who had appeared on his behalf before the trial Court, or it would have been mentioned in the memorandum of instant appeal or, at any rate, it would have been brought to the notice of this Court by the learned counsels appearing for the parties. However, there was lurking suspicion in the mind of the Court that some order must have been made by the State Government authorising certain officers to lodge complaint as contemplated by Section 12-AA(1)(e) of the Act and that the complainant must not have filed complaint without authorisation and jeopardised his whole case against the respondent. Unable to contain itself, during the course of hearing of arguments, this Court had summoned Ms.Pooja Chokshi, who is Librarian of "Hon'ble Judges' Library, High Court of Gujarat, Ahmedabad" and instructed her to find out whether any order is made by the State Government under Section 12-AA(1)(e) of the Act authorizing certain officers to lodge complaint against erring dealers. Competent as she is, after understanding instructions given to her, she swung into action with her team and after intensive search, she has been able to place necessary Order made by the State Government under Section 12-AA(1)(e) authorizing certain officers to lodge complaint. The Order made by the Government of Gujarat and published in Part IV-A of Gujarat Government Gazette Extraordinary on February 6, 1989 reads as under :-

"PART IV-A

Rules and Orders (other than those published in Parts I, I-A and I-L) made by the Government of Gujarat under the Central Acts.

FOOD AND CIVIL SUPPLIES DEPARTMENT

Order

Sachivalaya, Gandhinagar, 6th February, 1989.

Essential Commodities Act, 1955.

No.GTH-89-11-ECA-1085-1915-B.:- In exercise of the powers conferred by clause (e) of sub-section(1) of Section 12-AA of the Essential Commodities Act, 1955 (10 of 1955), the

Government of Gujarat hereby authorises all such officers specified in clause-26 of the Gujarat Essential Articles (Licensing, Control and Stock Declaration) Order, 1981 and clause 11 of the Gujarat Essential Articles Dealers (Regulation) Order, 1977 to file a complaint in the Special Court of competent jurisdiction under this section within their respective jurisdiction.

By order and in the name of the Governor of Gujarat.

D.S.SOLANKI
Joint Secretary to Government"

A bare reading of the Order quoted above makes it abundantly clear that officers designated in (1) Clause-26 of Order of 1981, and (2) Clause-11 of Order of 1977 are authorised to lodge complaint regarding commission of offence punishable under the Act. Therefore, it would be relevant to refer to those two Clauses. Clause-26 of Order of 1981 reads as under :-

"26. Power of entry, search, seizure etc.-

(1) Any Civil Supply Officer not below the rank of a Supply Inspector, any Revenue Offier not below the rank of a Deputy Mamlatdar, or any police officer not below the rank of Sub-Inspector and any other officer not below the rank of a class-II Gazetted Officer authorised by the Sate Government in this behalf, may with a view to securing compliance with this Order and to satisfying himself that this Order has been complied with :-

(i) enter and search any premises, vehicle, vessel or other conveyance with such assistance as may be necessary;

(ii) ask for any person all necessary questions;

(iii) examine any book or documents;

(iv) search and, so far as may be necessary for that purpose, detain any person or seize-

(a) any stock of essential articles in respect of which he has reason to believe that a contravention of any of the

provisions of this Order has been, is being or is about to be committed;

(b) any package, covering or receptable in which such essential article is found;

(c) any animal, vehicle, vessel or other conveyance used in carrying such essential articles if he has reasons to believe that such animal, vehicle, vessel or other conveyance is liable to be forfeited under the provisions of the Act;

(d) any books of accounts or documents which in the opinion of such person may be useful, or relevant to any proceeding under the Act and the person from whose custody such books of accounts or documents are seized shall be entitled to make copies thereof or to take extract therefrom in the presence of an officer having the custody of such books of accounts or documents;

(v) take or cause to be taken, the weight or measure of all or any of the stocks of essential articles found in any place:

(vi) direct by an order in writing any persons who owns or is in possession of any stocks of essential articles in respect of which he has reason to believe that a contravention of the provisions of this Order has been or is being or is about to be committed, not to remove or dispose of in any manner such stock of essential articles and the package, covering or receptacle in which such essentital articles is found and any animal, vehciles, vessel or other conveyance used in carrying such essential articles without further direction from the officer making such order.

(2) The provisions of section 100 of the Code of Criminal Procedure Act, 1973 (Act 2 of 1974) relating to search and seizure shall apply to search and seizure under this clause also;

Provided that if any such place or premises be found locked or unoccupied or unattended by or on behalf of the owner or occupier, the same may in the presence of two witnesses be broken open and entered into for all or any of the purposes aforesaid.

Whereas, Clause-11 of the Gujarat Essential Articles Dealers (Regulation) Order, 1977 reads as under :-

"11 Power of entry, search, seizure, etc.-

Any Civil Supply Officer not below the rank of a Supply Inspector, any Revenue Officer not below the rank of a Deputy Mamlatdar or any Police Officer not below the rank of a Police Sub Inspector and any other officer authorised by the State Government in this behalf, may, with a view to securing compliance with this order and to satisfying himself that this Order has been complied with,-

(i) enter and search any premises, vehicle, vessel or any other conveyance with such assistance as may be necessary,

(ii) ask of any person all necessary questions,

(iii) examine any books or documents,

(iv) search and, so far as may be necessary for the purpose of detain any person and seize-

(a) any stock of essential article in respect of which he has reason to believe that contravention of any of the provisions of this Order, has been, is being or is about to be committed;

(b) any package, covering or receptacle in which such essential article is found;

(c) any animal, vehicle, vessel or other conveyance used in carrying such essential article if he has reason to believe that such animal, vehicle, vessel or other conveyance is liable to be

forfeited under the provisions of the Act;

(d) any books of accounts and documents which in his opinion would be useful for, or relevant to any proceeding under the Act;

(e) take or cause to be taken, the weight or measure of all or any of the stocks of essential articles found in any place;

(f) direct by an order in writing any person who owns or is in possession of any stock of essential article in respect of which he has reason to believe that a contravention of the provisions of this Order has been, is about to be committed, not to remove or dispose of in any manner such stock of essential article and the package, covering or receptacle, in which such essentital article is found and animal, vehcile, vessel or other conveyance used in carrying such essential article without further direction from the officer making such order.

Provided that the provisions of section 100 of the Code of Criminal Procedure Act, 1973 (Act 2 of 1974) relating to search and seizure shall apply to search and seizure under this clause.

11. A conjoint and meaningful reading of (i) the complaint, (ii) the testimony of the complainant and documents produced by him in support of his case against the respondent, (iii) the contents of Order dated 6th February, 1989 made by Goovernment of Gujarat which is reproduced above, (iv) provisions of Clause-26 quoted above, and (v) provisions of Clause-11 of the Order of 1977, makes it evident that the complainant being Chief Supply Inspector was/is competent to lodge complaint against the respondent. The Order under Section 12-AA(1)(e) of the Act was made on 6th February, 1989, whereas the Chief Supply Inspector had filed complaint on July 6, 1990 and was, therefore, in accordance with law. Probably, the point whether the complainant had necessary authorization to lodge complaint or not, was considered by the learned Judge of the trial Court on his own and, therefore, the necessary order could not be produced by

the complainant before him. However, there is no manner of doubt that the learned Judge has proceeded on wrong facts and delivered the judgment. This Court is competent to take judicial notice of the Order dated 6th February, 1989 quoted above as well as provisions of Clause-26 of Order of 1981 in exercise of powers conferred on the Court by Section 57 of the Indian Evidence Act. Once it is held that the complainant had necessary authorization in his favour enabling him to lodge complaint against the respondent, the impugned judgment becomes vulnerable and is liable to be set aside. Under the circumstances, the arguments advanced at the Bar on interpretation of Section 11 and Section 12-AA(1)(e) of the Act are not considered and it is held that the impugned judgment is liable to be set aside because it has proceeded on wrong and non-existent facts.

12. Coming to the merits of the case, this Court finds that as observed earlier, the learned advocate of the respondent could not argue that breaches of provisions of Order of 1977 and Order of 1981 read with the provisions of the Act, as averred by the complainant, were not committed by the respondent. The testimony of the complainant read with the documents produced by him, unerringly establishes that the respondent had dealt in groundnut-oil and vegetable-ghee without necessary licence, though so mandated by the provisions of Order of 1981. Merely because he had applied for licence, he was not entitled to deal in essential articles without licence. If the view taken by the learned Judge of the trial Court that the respondent was entitled to deal in essential articles as he had applied for a licence, is upheld, it would amount to amending statutory provisions of Order of 1981 and by a Court of law, which is not permissible at all. Further, the evidence led by the complainant establishes that he had stored quantity of groundnut-oil and vegetable-oil in excess of quantity than prescribed by Clause-3 of Order of 1981. The evidence adduced by the complainant also establishes that the respondent was selling essential articles without issuing cash-memo or bill to the customer and was not maintaining proper accounts of sale etc. Therefore, there is no manner of doubt that the respondent has committed breaches of Order of 1977 as well as that of Order of 1981, which are punishable under Section 7 of the Essential Commodities Act, 1955. Section 7, inter alia, provides that if any person contravenes any order made under Section 3, he shall be punishable, (i) in the case of an order made with reference to clause (h) or clause (i) of sub-section (2) of that section with imprisonment for a term which may extend to one year and

shall also be liable to fine, and (ii) in the case of any other order, with imprisonment for a term which shall not be less than three months, but, which may extend to seven years and shall also be liable to fine. It also, inter alia, provides that any property in respect of which the order has been contravened shall be forfeited to the Government. There is no manner of doubt that the respondent has committed offence punishable under Section 7 of the Act and, therefore, minimum punishment as prescribed by law will have to be imposed on him.

13. The plea that having regard to passage of time and nature of contraventions of provisions of Order of 1977 and Order of 1981 made by the respondent, the respondent should be granted benefit of probation as provided under Section 360 of the Code of Criminal Procedure, 1973, cannot be accepted. As noticed earlier, provisions of the Act have been enacted for ensuring the availability of essential commodities at fair price and for curbing hoarding, black-marketing or profiteering in such commodities. If benefit of probation as contemplated by section 360 of the Code is granted to a person, who has committed offence under the provisions of the Act, it would frustrate the object of the Act. Under the circumstances, no benefit of probation can be granted to the respondent.

14. For the foregoing reasons, the appeal succeeds. The respondent is convicted of the offence punishable under Section 7 of the Essential Commodities Act, 1955 and sentenced to R.I. for three months and fine of Rs.3,000/- (Rupees Three Thousand only), in default, S.I. for one month. The property, in respect of which Order of 1977 and Order of 1981 have been made, shall be forfeited to the Government.

At this stage, the learned counsel of the respondent prays that six weeks time be given to the respondent to surrender to the authority concerned. Having regard to the facts of the case, the prayer is accepted and time of six weeks is granted to the respondent to surrender to the authority concerned.

(J.M.Panchal,J.)

(patel)